

C. Bruce Loble
Chief Water Judge
Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
Fax (406) 522-4131

FILED

JUN 04 2010

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION - BIG HOLE RIVER BASIN (41D)

CLAIMANTS: Beaverhead Water Company;
Garrison Ranches Inc; Paul H Cleary Jr Trust

OBJECTOR: Montana Trout Unlimited

NOIA: Kenefick Ranches

CASE NO. 41D-1

41D 119089-00	41D 119116-00
41D 119090-00	41D 119117-00
41D 119094-00	41D 119118-00
41D 119095-00	41D 119119-00
41D 119098-00	41D 119120-00
41D 119100-00	41D 119121-00
41D 119102-00	41D 119122-00
41D 119104-00	41D 119123-00
41D 119105-00	41D 119124-00
41D 119106-00	41D 119125-00
41D 119107-00	41D 119126-00
41D 119108-00	41D 119127-00
41D 119109-00	41D 119128-00
41D 119110-00	41D 119129-00
41D 119111-00	41D 119130-00
41D 119112-00	41D 195071-00
41D 119113-00	41D 195072-00
41D 119114-00	41D 195073-00
41D 119115-00	41D 216099-00

**DECISION ON DISMISSAL
OF MONTANA TROUT UNLIMITED'S
BIG HOLE RIVER DECREE OBJECTIONS**

Procedural Background

The Temporary Preliminary Decree for the Big Hole River (Basin 41D) was issued on April 6, 2007. The Decree included water right claims owned by Beaverhead Water Company, Garrison Ranches, Inc., and Paul H. Cleary Jr. Trust ("Claimants"). The deadline for filing objections to the claims included in the Big Hole River Decree expired on March 31, 2008.

On March 31, 2008, Montana Trout Unlimited ("TU") filed Notices of Objection and Requests for Hearing directed to the claims of these water users. The objections identified several elements of the claim abstracts that TU contends should be modified. Many objections referenced issue remarks placed on the claim abstracts by the Department of Natural Resources and Conservation (DNRC) during its claim examination review process. Some of these issue remarks highlight possible expansions of historical water rights.

The Claimants filed motions to dismiss objections (with prejudice) and alternative motions for a more definite statement. The motions to dismiss were based on the Claimants' belief that the objections failed to demonstrate standing to object to the claims, and their alternative motions were based on TU's failure to specify the claim numbers affected by the decree, so that Claimants could file counterobjections, as authorized by 85-2-233(3), MCA. Similar objections and motions to dismiss, and the resulting issues and arguments, were raised and resolved in Case 41D-2 involving objections filed by Western Watersheds Project ("WWP"). Since the issues and arguments in Cases 41D-1 and 41D-2 are similar, this Decision is similar.

This Court consolidated the claims captioned above into Case 41D-1. At the first status conference, the Court discussed (1) the advisability of converting the motions to dismiss into Rule 56 motions for summary judgment; and (2) Water Right Adjudication Rule 16(c), which requires leave of court to file dispositive motions before the Court issues its hearing track order. At that time, the parties stipulated that leave of court would be granted to Claimants and Objectors, pursuant into Rule 16(a), W.R.Adj.R., to file their motions to dismiss and responses, *nunc pro tunc*, and that resolution of the issues raised by the various motions would not begin until after the deadline of the 60-day Notice of Intent to Appear (NOIA) expired. The Court granted the Claimants permission to file *nunc pro tunc* their various motions to dismiss. *Joint Court Minutes and Hearing Track Order* filed October 8, 2008.

On January 20, 2009, Ed Kilwien, Sr. filed a NOIA to monitor “objections made by others to make sure any changes resulting therefrom are consistent with historic use, and do not adversely affect appearing party.” His attorney’s name was added to the service list.

On February 2, 2009, Kenefick Ranches filed a NOIA because “[t]he resolution of the legal issues in this matter will affect similar issues involving Kenefick Ranches’ claims.” Its attorney’s name was added to the service list. Kenefick Ranches subsequently filed a Notice that it would simply monitor the proceedings.

The NOIA deadline expired on February 3, 2009. On February 18, 2009, this Court filed its *Notice of Conversion of Motion to Dismiss into Motion for Summary Judgment, Order Setting Briefing Schedule, and Order Updating Caption and Service List*. In that *Notice*, the Court ordered that:

Upon completion of the briefing, the Court will schedule a Rule 56, M.R.Civ.P. hearing in Dillon, unless the parties file a specific waiver of the hearing opportunity and consent to the Court accepting Claimants’ and TU’s assertions as true, and further waive any objection to the Court relying on the attachments to TU’s briefs. The voluntary filing of such a waiver and consent would close the record, and consent for the Court issuing a ruling on the Motion to Dismiss on the record existing at the date the waiver and consent was filed, and without the presentation of additional evidence and without a Rule 56 hearing.

On March 27, 2009, in accordance with the February 18, 2009 *Notice and Order*, the Claimants and Montana Trout Unlimited, by and through their attorneys of record, filed *Unopposed Waiver of Hearing Opportunity, Consent to the Court Accepting Claimants’ and TU’s Assertions as True, and Waiver of Any Objection to Court Relying on the Attachments to the Brief, Unopposed Motion to Revise Case Caption to Reflect All Water Right Claims at Issue and Brief in Support*. In that document, they stated: “It is the intention of the parties that this voluntary waiver and consent will close the record and allow the Court to issue a ruling on the *Motion to Dismiss* based upon the record as it exists on the date the waiver and consent are filed, without the presentation of additional evidence and without a Rule 56 hearing.

On March 31, 2009, the Court vacated the scheduling conference and ordered that “the issues raised herein will be resolved on the existing record as agreed upon by the parties and the record in this Case is now closed.”

ISSUES PRESENTED

The Claimants assert the TU objections should be dismissed because TU does not have standing because: (1) neither TU nor its members are a person named in the decree or the holder of a permit or reservation affected by the decree, as required by § 85-2-233(1)(a), MCA; (2) it failed to allege any property interest that is affected by the decree, as required by § 85-2-233(1)(b), MCA; and (3) the Department of Fish, Wildlife, and Parks is the exclusive representative for public rights of recreation in the present adjudication, pursuant to § 85-2-223, MCA.

In its Response, TU asserted that it has standing to object to the claims, because it is an “interested person within the basin” who requested service of the notice of availability of the temporary preliminary decree, as authorized in § 85-2-232(1)(f)(iii), MCA; or in the alternative, because TU and its member have “interests” in the Big Hole River basin affected by a temporary preliminary decree that is not sufficiently supported by historical beneficial use, as required by § 85-2-233(1)(a) and (b), MCA. TU’s *Response to Motion to Dismiss* at 4-5, et seq.

By virtue of the parties’ filed Consent, the facts alleged by both parties are undisputed, and the question of TU’s standing is purely a question of law. The primary legal issue before the Court, therefore, is whether, under the undisputed allegations in the pleadings, and the admissions and affidavits in the record, TU, in its own right or on behalf of its members, is entitled to a hearing in the Water Court on its objections to the claims of existing water rights in this case. To decide this primary issue, the Court must determine:

- I. Whether TU is entitled to a hearing on its objections, because it is an “interested person” who requested notice of availability of the temporary preliminary decree, pursuant to Section 85-2-233(1) (a) and 85-2-232(1), MCA?
- II. Whether TU has established “good cause” for a hearing on its objections, pursuant to Section 85-2-233(1) (b), MCA?
- III. Whether, even in the absence of statutory standing, TU and its members have a legitimate role to play in the present adjudication of the Big Hole River basin to ensure that DNRC issue remarks included in the temporary preliminary decree claim abstracts are finally resolved on the basis of “strict proof” of actual historical beneficial use?

DISCUSSION

General Rules of Standing in Montana

The Montana Supreme Court has held that the question of standing is whether a litigant is entitled to have the court decide the merits of the dispute or of particular issues, and whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue. *Gryczan v. State of Montana*, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997). The inquiry involves both constitutional limitations drawn from the “cases at law and in equity” definition of state judicial power in Article VII of the 1972 Montana Constitution, and discretionary doctrines aimed at prudently managing judicial review of the legality of public acts. *Stewart v. Board of County Commissioners of Big Horn County*, 175 Mont. 197, 200, 573 P.2d 184 (1977) (citing Art. VII, Montana Constitution (1972) and 13 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3531 at 176).

This Court discussed the general rules of standing for individuals and associations in Montana in its *Decision on Dismissal of Western Watersheds Project and Laurence D. Zuckerman Big Hole River Decree Objections*, at pp. 7-9, in Case 41D-2 filed May 27, 2010 (“41D-2 Decision”). As the same issues in this case were raised and resolved in Case 41D-2, the 41D-2 Decision is incorporated herein. To avoid unnecessary duplication, the Court will usually refer to the 41D-2 analysis instead of repeating the same analysis herein. A copy of the 41D-2 Decision will be mailed to the 41D-1 parties together with this Decision.

I.

Whether TU is entitled to a hearing on its objections, because it is an “interested person” who requested notice of availability of the temporary preliminary decree, pursuant to Section 85-2-233(1) (a) and 85-2-232(1), MCA?

In its *Response*, TU based its right to object and be heard in the Water Court on Section 85-2-233(1) of the Montana Code Annotated, which provides, in part, as follows:

Hearing on temporary preliminary decree or preliminary decree. (1) (a) *For good cause shown* and subject to the provisions of subsection (9),¹ *a hearing must be held before the water judge on any objection to a temporary preliminary or preliminary decree by:*

¹ Subsection (9) referenced in the above quote concerns issue and claim preclusion in subsequent decrees and is not relevant here.

- (i) the department;
 - (ii) a person named in the temporary preliminary decree or preliminary decree;
 - (iii) *any person within the basin entitled to receive notice under 85-2-232(1);*
or
 - (iv) any other person who claims rights to the use of water from sources in other basins that are hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice under 85-2-232 if the claim or claims were from sources within the decreed basin.
- (b) For the purposes of this subsection (1), “*good cause shown*” means a written statement showing that a person has *an ownership interest in water or its use that has been affected by the decree.*
- (Italics added)

Section 8-2-232(1), referenced in subsection (1) (a) (iii) above, states in part:

(b) The water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to each person who has filed a claim of existing right within the decreed basin or to that person’s successor as documented in the department’s records.

(c) . . . to the purchaser under contract for deed . . . of property in connection with which a claim of existing right has been filed within the decreed basin.

(f) The notice of availability required under this section must also be served upon:

- (i) those issued or having applied for and not having been denied a permit to beneficially use water within the decreed basin pursuant to Title 85-chapter 2, part 3;
- (ii) those granted a reservation within the decreed basin pursuant to 85-2-316; or
- (iii) other interested persons who request service of the notice from the water judge.

TU argues that under these statutes, the right to a hearing on objections to the temporary preliminary decree is not limited merely to people who have filed claims or hold reservations in the basin. By reference, it argues that it extends to any party entitled to receive notice under 85-

2-232(1) (f) (iii), which expressly includes “interested persons who request service of notice of availability from the water judge.”

In support of its argument, TU attached copies of an email notice from the chief water judge to TU attorneys Stan Bradshaw and Laura Ziemer (and others) advising them that the Water Court had mailed notices to Claimants in the Big Hole River basin advising that Notice of the issuance of the Big Hole River Decree would be mailed out by the DNRC on Friday, April 6, 2007 and advising of their opportunity to file objections, and two emails to Bradshaw and Ziemer (and others) from the chief water judge advising them that the objection filing deadline for the basin had been extended, together with a copy of the Order Granting Motion For Extension of Time To File Objections.

The Montana Supreme Court has emphasized the limited role that the courts play in the interpretation of statutes. *Montanans for Justice v. State of Montana*, 2006 MT 277, ¶ 60, 334 Mont. 237, 146 P.3d 759 and *Oster v. Valley County, Montana*, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079.

When 85-2-233(1) is read as a whole, including (a) and (b), the plain language of the statute indicates that the Legislature intended that objectors must satisfy *two criteria* when filing objections. An objector must establish that: (1) it is one of the entities specified in 85-2-233(1) (a); **and** (2) show “good cause” for a hearing. “Good cause shown” is defined in 85-2-233(1) (b) as “a written statement showing that a person has *an ownership interest in water or its use that has been affected by the decree.*” (Italics added)

The email notices from the chief water judge indicate that the TU attorneys requested notice of Water Court activities. Pursuant to those requests, the Court mailed notices to TU (and other requesting parties) through the internet, a practice authorized by Rule 27 of the Water Right Adjudication Rules (2006). Simply requesting and receiving notice, however, is not sufficient for a hearing on objections in the adjudication. TU is also required to satisfy the second prong of the statutory test: “good cause shown.”

....
....
....
....

II.

Whether TU has established “good cause” for a hearing on its objections, pursuant to Section 85-2-233(1) (b), MCA?

TU contends that it has standing to object to the Big Hole River claims, because it and its members have “interests” in the waters of the Big Hole River basin adversely affected by the temporary preliminary decree, which will be injured if the existing water right claims in the decree are not subjected to “strict proof” of historical beneficial use.

TU’s Statement of Interest. In its Response to Motion to Dismiss, TU set forth its statement of interests in the waters of the Big Hole River basin and the adverse affect the decree would have on those interests. In summary, TU stated that:

- “TU’s purpose in objecting to these water right claims . . . is to *ensure that the water right claims are given a thorough examination and are well supported by historic beneficial use.*” (Citing *In re Adjudication of Existing and Reserved rights of Chippewa Cree Tribe*, 2002 ML 4232, 2002 Montana Water LEXIS 1, 25; and *Concerning Application for Water Rights of Turkey Cañon Ranch Ltd. Liability Co.*, 937 P.2d 739, 747 (Colo. 1997);
- “TU has been a *partner* in water administration in the Big Hole River Basin for over ten years,” and “TU is a conservation group *dedicated to the conservation, protection, and restoration, of coldwater fish*, including Montana’s wild salmonids such as arctic grayling, rainbow trout, bull trout, brown trout, and cutthroat trout;”
- “Trout Unlimited has been *actively involved in the cooperative restoration efforts for arctic grayling and trout in the Big Hole River . . . [and] contributed funding* to support the administration of the voluntary drought effort . . . [and] the arctic grayling restoration effort . . . ;”
- “Low river and tributary flows are one of the key limiting factors for the survival and recovery of the arctic grayling. . . ;”
- “If the Big Hole decree goes forward with water right claims that are not supported by historic beneficial use, then TU’s efforts . . . would unravel;”
- “TU’s interest in Big Hole water use *relates to the fulfillment of the Department of Fish, Wildlife and Park’s instream reservations*” [in that] “[h]aving adequate flows . . . to fulfill . . . the Department’s instream right is integral to TU’s restoration efforts in the Big Hole River basin” . . . and

to “ensure that TU members . . . can continue to enjoy fishing the Big Hole;”

Response to Motion to Dismiss at 5-8 (italics added).

Attached to the *Response* are the *Affidavits* of Bruce Farling and Harry Murphy, both dated May 27, 2008. In his *Affidavit*, Mr. Farling represents that:

- he resides in Missoula, Montana and is the executive director of TU;
- “Montana Trout Unlimited is a *conservation group whose mission is conservation, protection and restoration of coldwater fish*, including Montana’s wild salmonids . . .;”
- TU “has been an *active participant* in the Big Hole Watershed Group and has *contributed funding . . . to support on-the-ground administration of the Big Hole voluntary drought management plan*” and to “restoration efforts that benefit fluvial grayling in the Big Hole;” and
- that “[a]s an advocate for the maintenance and protection for the cold water fishery in the Big Hole River and as an active participant in the voluntary efforts *MTU has a direct interest in assuring that the adjudication of water rights in the Big Hole basin are as accurate as is reasonably possible.*”

(Italics added)

In his *Affidavit*, Harry Murphy represented:

- that he resides in Bozeman, Montana, and is a member of TU;
- that he has “specifically fished the Big Hole River for 19 years;”
- that “in recent years [he has] had to curtail fishing on the Big Hole because of low flows in the River that have resulted in closures of the river to fishing;” and
- that “as a member of Trout Unlimited and as one who has fished on the Big Hole and [one] who continues to fish on the Big Hole, [he has] an interest in an accurate adjudication of water rights in the Big Hole River Basin.”²

It is beyond dispute that all citizens of Montana have public environmental and recreational interests in the natural waters of Montana. Those interests are specifically

² Although TU’s *Response to Motion to Dismiss* refers on p. 7 to an *Affidavit of William E. Murray* in support of its allegation that “low flow conditions have curtailed the fishing opportunities of its members,” the Murray Affidavit was not attached to TU’s *Response*.

acknowledged in the 1972 Montana Constitution, policy statements articulated by the Legislature in legislative acts; and previous decisions of the Montana Supreme Court. *See e.g.*, Article II, § 3, Article IX, § 1, and Article IX, § 3 of the 1972 Montana Constitution; Section 23-2-302, et seq., MCA; Sections 85-1-101, 85-2-101, 85-2-223, and 87-5-501; and Section 75-5-101 and 75-5-303.

For purposes of the Claimants' motions for summary judgment, the Court will assume that TU's statement of interest and the affidavits of its members sufficiently allege *personal* environmental and recreational interests of the members in the Big Hole River basin, distinct from the public at large, that arguably could be adversely affected by the temporary preliminary decree in the Big Hole River basin.

Under the broad standing requirements of the Montana Administrative Procedures Act and even broader standing requirements of most federal and Montana environmental protection statutes, such interests may be sufficient for persons to establish either constitutional or statutory standing to challenge the *constitutionality* of governmental acts or agency decisions.³

However, personal environmental and recreational interests in the water, alone, are not sufficient to establish the "personal stake" required for standing to be heard on objections to claims in the present adjudication of existing water rights, unless those interests are *coupled with* an "*ownership interest in water or its use. . . .*"

Ownership Interest in Water or its Use. TU asserts that the Water Court should construe the standing requirements of 85-2-233(1) liberally and apply the "broad tent" policy articulated by the Court in Case WC-2000-01, involving the *Chippewa Cree Tribe – Montana Compact*, filed June 12, 2002, which required only a "minimal" claim or interest in land or water that could "feasibly" be adversely affected by the decree in order to establish standing to object to the compact in that case. Similar arguments were made by WWP in Case 41D-2.

³ *See e.g.*, 16 U.S.C. § 1540(g)(1)(A) of Endangered Species Act ("any person may commence a civil suit"); 33 U.S.C. § 1365(a)(1) and § 1365(g) of the Clean Water Act ("any citizen . . . having an interest which is or may be adversely affected"); 30 U.S.C. § 1270(a) of the Surface Mining Control and Reclamation Act ("any person having an interest which may be adversely affected"); *Clark Fork Coalition v. Montana Department of Environmental Quality*, 2008 MT 407, ¶ 24, 347 Mont. 197, 197 P.3d 482; *Bitterroot River Protective Association, Inc. v. Bitterroot Conservation District*, 2008 MT 377, ¶¶ 28, 45, 346 Mont. 507, 198 P.3d 219; and *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, ¶¶ 45, 47, 48, 296 Mont. 207, 988 P. 2d 1236.

In resolving the issues raised and argued by WWP in that case, the Court reviewed the legislative history of Section 85-2-233(1), MCA, and concluded that over time, statutory and rule amendments have narrowed, rather than broadened, the scope of persons eligible to file objections in Montana's water right adjudication effort. The Court concluded that if the Legislature had intended to provide an expansive or liberal objection process during the water adjudication effort, then it could have used language similar to that used in Section 85-2-308(3), MCA, which extends standing in the DNRC administrative process to objectors if their "property, water rights, *or interests* would be adversely affected by the *proposed appropriation*." (Italics added) Instead, the plain language of 85-2-233(1), MCA, together with its amendments over time, and the rules adopted by the Montana Supreme Court, demonstrate a historical intent to *limit* the scope of the adjudication objections to entities who can establish "an *ownership* interest in water or its use." To be entitled to a hearing on its objections to the claims in this case, therefore, the personal environmental and recreational interests of TU's members must be coupled with an "*ownership* interest in water or its use. . . ." The Court's full legislative history and analysis of the "good cause shown" standard of Section 85-2-233(1), MCA, is set forth on pages 18-21 of the *41D-2 Decision* and is incorporated herein by reference.

The "broad tent" language employed by the Water Court in Case WC-2000-01, is limited to the facts and circumstances of that case. The objectors in Case WC-2000-01 had filed claims of existing water rights within the drainage covered by the Chippewa Cree - Montana Compact (Section 85-20-601, MCA). The compacting parties challenged the remoteness and degree of any potential harm to the objectors' existing water rights by the Compact provisions. In response, this Court found that the effect of incorporating an extensive tribal water right that was not based on traditional Montana water law, but on the federal law of "implied" reservations of water and quantified on the basis of equitable principles of division and future needs of the reservation, could have a pervasive affect on the entire basin.

Under those circumstances, the Court granted standing (with one exception) to even remotely located claimants, with only a minimal chance of being adversely affected. In doing so, this Court also recognized that the potential harm to some of the objectors in the Compact case was so remote that the Court may have been stretching the "broad tent" policy too far. *Opinion Chippewa Cree Tribe – Montana Compact*, Cause WC-2000-01, p. 17. No matter how remote

the location or minimal the potential affect, however, every objector granted standing to object to the Compact in that case, had *filed a claim in the adjudication* for an existing water right in the drainage basin affected by the Compact Decree.

Establishing an Ownership Interest in Water or its use. The Montana Supreme Court has long recognized that the water resources within Montana are owned by the State of Montana, for the use of its people. In its *41D-2 Decision*, this Court discussed the public ownership aspect of Montana's water, including the "public trust" doctrine. The Court reviewed the Montana Constitutional provisions recognizing the public's right to use Montana's waters and directing the Legislature to provide for the administration, control, and regulation of those rights. It reviewed the regulations and procedures established by the Legislature for establishing ownership rights to the use of Montana's water for purposes of the present state-wide adjudication – including rights to use the water for fish, wildlife, and recreation purposes. That discussion is set forth on pages 24-28 of the *41D-2 Decision* and is incorporated herein.

To summarize, this Court recounted that on July 8, 1979, pursuant to the petition of the Montana Attorney General, the Montana Supreme Court issued Order No. 14833 requiring every person asserting a claim to an existing right to the use of water arising prior to July 1, 1973 to file a statement of claim to that right with the department by a specified date. *See* also Section 85-2-212, MCA. Only claims for stock and individual municipal domestic uses based on instream flows or groundwater sources were exempt from the filing requirement. Sections 85-2-212 and 85-2-222, MCA. In a "carrot and stick" approach to encourage the filing of claims, Section 85-2-227, MCA, provided that all claims filed in accord with Section 85-2-221, MCA, would constitute prima facie proof of their contents, and Section 85-2-226, MCA, provided that the failure to file a claim in accordance with 85-2-221(1) established a conclusive presumption of abandonment of that right.

In *Matter of Adjudication of Existing Rights to Use of Water within Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992), the Montana Supreme Court considered whether Section 85-2-226, MCA (the conclusive presumption of abandonment statute), was unconstitutional in light of Article IX, Section 3 of the Montana Constitution. The Court concluded that the statute was not unconstitutional and stated as follows:

We conclude that Article IX, Section 3(1), of the Montana Constitution does not establish that pre-1973 water rights are immune from sovereign powers. These rights, like other property rights, are protected against unreasonable state action; however, they have not been granted indefeasible status. Furthermore, we conclude that consistent with *Article IX, Section 3(1), of the Montana Constitution*, the State Legislature may enact constitutionally sound regulations including the requirement for property owners to take affirmative actions to maintain their water rights.

253 Mont. 167, 174, 832 P.2d 1210 (1992).

There is no evidence in the present case that TU, or any of its members, filed any claims of existing water rights for fish, wildlife, recreation purposes, or any other purpose in Montana's statewide water right adjudication, on its own behalf or on behalf of the public's interests in the water, and also no applications for post-June 1973 certificates and permits to appropriate water.

Nor were they authorized to do so under specific provisions of the Montana Water Use Act of 1973. In the *41D-2 Decision*, this Court concluded that only the DNRC and DFWP are authorized by the Montana Legislature to represent the public in the adjudication process.

Statutory Representatives of the Public Interest. Section 85-1-101(3), MCA, of the Water Use Act of 1973 provides that:

The State, in the exercise of its sovereign power, acting through the department of natural resources and conservation, shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of the water resources.

(Bolding added)

Section 85-1-204(1), MCA, provides in part:

To the extent that it may be necessary to carry out this chapter and subject to compliance with the other provisions of the chapter, **the department has full control of all the water of the state not under the exclusive control of the United States and not appropriated for private use.** The department shall take the necessary actions to **appropriate** and conserve the **water for the use of the people.** The authority of the department conferred by this chapter extends and applies to rights to the natural flow of the water of this state that it may acquire by condemnation pursuant to Title 70, chapter 30, or by purchase, exchange, appropriation or agreement.

(Bolding added)

In 1987, the Montana Supreme Court discussed the role of the DNRC in fulfilling its duties in the water right adjudication effort as follows:

DNRC is a holder of water rights, representing the State. As such it has water rights which are subject to the claims registration requirements of the Montana Water Use Act. Thus, DNRC is a claimant in the adjudication process. As a claimant, it may make objections to preliminary decrees in the defense of its rights. Moreover, the DNRC may object to any preliminary decree, independent of its status as a water right claimant [, pursuant to] Section 85-2-233, MCA. In *Matter of the Activities of the DNRC*, 226 Mont. 221, 233-234, 740 P.2d 1096 (1987).

In addition, Section 85-2-223, MCA, provides in part that:

The department of fish, wildlife, and parks *shall exclusively represent the public* for purposes of establishing any prior and existing public recreational use in existing right determinations under this part, *provided that* the foregoing shall not exclude a federal governmental entity from representing the public for the purpose of establishing any prior and existing public recreational use in existing right determinations under this part.

(Italics added)

As originally enacted in 1973, the Legislature merely provided that “[t]he department of fish and game *may represent the public* for purposes of establishing any prior and existing public recreational use in existing right determinations under this act. . . .” Section 89-872(1)(a), R.C.M. (1947) (italics added). The mandatory “shall” and “exclusive” language was added in 1979 as part of Senate Bill 76, which was intended to “expedite and facilitate” the present adjudication of existing water rights. Section 12, Ch. 697, L. 1979.

In 1989, the Montana Supreme Court underscored the role of the DFWP in fulfilling its duties to represent the public recreational interest in the adjudication effort as follows:

The [DFWP] . . . has been charged by § 85-2-223, MCA, with the duty of representing the public interests in regard to recreational use of Montana waters. The duty conferred by this statute is concomitant with Article IX, Section 3, Part 3 of the Montana Constitution . . . This provision sets forth the fact that the waters of the State belong to the State for use by all of its citizens. However, as this case demonstrates, these uses often conflict, and competing interests often disagree over how this resource should be allocated.

The premise of the Montana Water Use Act anticipates these disagreements, and the integrity of Montana’s adjudication process depends upon the assertion and ultimate resolution of these varying interests. The provisions of the Act charge all water users with the duty of asserting and defending their interests. The Stockgrowers has taken upon itself the duty of defending a private agricultural interest. The [DFWP], on the other hand, has been directed to enhance and protect the State’s resources under its charge. It therefore claims waters necessary

to ensure the well being of fish, wildlife and scenic values in order to fulfill this mandate.

Matter of Dearborn Drainage Area (Bean Lake II), 240 Mont. 39, 42-43, 782 P.2d 898 (1989) (Bolding added).

Thirteen years later, the Montana Supreme Court reiterated, in the first paragraph of its decision recognizing fish, wildlife, and recreational water use as a beneficial use, that: **“Only DFWP can represent citizen interests in the adjudication process”** *Matter of the Missouri River Drainage Area (Bean Lake III)*, 2002 MT 216, ¶ 1, 311 Mont. 327, 55 P.3d 396 (emphasis added). This one line declaratory statement from the Supreme Court is very clear.

Accordingly, although TU and its members’ environmental and recreational interests in the Big Hole River basin are “related” to the citizen interests claimed and reserved by the DNRC and DFWP, the Legislature and the Supreme Court have resolved the public policy and legal debate on who represents the public in the adjudication process. As a result, TU does not have standing to champion the public interests either through the filing of claims or through the filing of objections to claims. See the *41D-2 Decision*, pages 22-33, incorporated herein.

III.

Whether, even in the absence of statutory standing, TU and its members have a legitimate role to play in the present adjudication of the Big Hole River basin to ensure that DNRC issue remarks included in the temporary preliminary decree claim abstracts are finally resolved on the basis of “strict proof” of actual historical beneficial use?

In its Response to Motion to Dismiss, TU emphasized the important role that private organizations like TU have played in conserving, protecting and restoring coldwater fish (like wild salmonids) in Montana. It characterized its role as a collaborative “partnership” with other water users in restoring the habitat and administering the waters of the Big Hole River Basin. It alluded to the important role private organizations like TU can play in resolving DNRC issue remarks to which no claimant has objected, and in ensuring that claims filed in the adjudication are given a thorough examination and are well supported by “strict proof” of actual historical beneficial use.

As WWP did in Case 41D-2, TU cited the Colorado Supreme Court decision of *Concerning Application for Water Rights of Turkey Cañon Ranch Ltd. Liability Co.*, 937 P.2d

739, 747 (Colo. 1997) for the proposition that “any person may object to a water rights application and participate in the adjudication by holding the applicant to a standard of ‘strict proof.’” TU did acknowledge in its Response at page 6 that Colorado’s broad approach in *Turkey Cañon* was “tightly linked to Colorado’s statute that allows ‘any person’ to file a ‘statement of opposition’ in a water court proceeding.” This linkage eliminates the applicability of *Turkey Cañon* in this case.

Montana’s standard of review begins with its prima facie proof statute. This Court reviewed the meaning, legislative history, and policies behind Montana’s prima facie proof statute in its *Memorandum Opinion* in Water Court Case 40G-2, filed March 11, 1997. That history revealed that the statute was part of an effort by the Legislature to “expedite and facilitate” the general adjudication of existing water rights by eliminating the necessity for a “beneficial use hearing” for every claim filed. *Memorandum Opinion* in Case 40G-2 at 10. Unlike the Colorado standard, the Montana Legislature placed the burden of proof on objectors to demonstrate the lack of historical beneficial use. See also Rule 19, W.R.Adj.R.

As this Court concluded in its *41D-2 Decision*, it concludes here also. The *Turkey Cañon* strict proof standard is neither analogous to the facts and procedures involved in this case, nor controlling (or even persuasive) law in Montana, and is therefore irrelevant to resolving any issue remarks on the claim abstracts in this case.

Finally, in response to the general principles articulated by TU that it and its membership have a legitimate role to play in Montana’s water adjudication effort, the Court recognizes and acknowledges TU’s historical contributions to this effort. For example, TU filed a brief and participated in oral argument before the Supreme Court in *Bean Lake III*, 2002 MT 216, – a landmark case involving issue remarks relating to the validity of fish, wildlife, and recreation claims in the statewide adjudication. But its participation was limited to that of Amicus Curiae and not as a party in the case. Furthermore, for years, TU’s attorneys have participated in the Water Right Adjudication Advisory Committee meetings, legislative hearings, and the Water Court’s rule making efforts on a regular basis. TU has contributed much to the outcomes. But again, its attorneys and members have participated in the same manner as any other citizen is entitled to do under the Montana Constitution.

Where, as here, TU's interests are not coupled with an enforceable ownership interest in the water or its use, acquired pursuant to the Montana Water Use Act of 1973, then its role as an advocate lies not through objections to claims in the statewide adjudication, but in continuing to participate in the myriad other opportunities and programs established by state law that invite and encourage the kind of interests, dedication, and expertise evidenced by TU in this case.

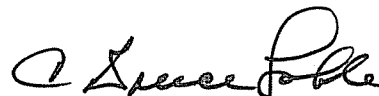
CONCLUSION

Rule 56(c), M.R.Civ.P., provides that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The facts alleged by TU in its pleadings, briefing, and other documents on file in this case failed to establish "good cause" for a hearing on its objections, as required by Section 85-2-233(1), MCA. Specifically, TU failed to establish an "ownership interest in the water or its use affected by the decree," that would be enforceable in this statewide adjudication of existing water rights under the Montana Water Use Act of 1973. In addition, TU is not the proper party to represent the public for purposes of establishing any prior and existing recreational use in the Big Hole River in the present adjudication because the Legislature has expressly and specifically assigned that power and delegated that duty exclusively to the Montana Department of Natural Resources and Conservation and the Montana Department of Fish, Wildlife, and Parks. Any DNRC issue remarks on the water right abstracts that are not otherwise resolved through the objection process will be resolved by the Court pursuant to the procedures set forth in Sections 85-2-427 and 428, MCA.

For the reasons expressed herein and sometimes more fully set forth in this Court's *41D-2 Decision*, incorporated herein, the objections filed by Montana Trout Unlimited in the Temporary Preliminary Decree of the Big Hole River (Basin 41D) are **DISMISSED**.

DATED this 4th day of June 2010.



C. Bruce Loble
Chief Water Judge

Laura Ziemer
Attorney at Law
321 East Main St Ste 411
Bozeman MT 59715

Stan Bradshaw
Attorney at Law
PO Box 412
Helena MT 59601

John E Bloomquist
Patti L Rowland
Sarah E Rupp
Attorneys at Law
PO Box 1418
Dillon MT 59725

Cindy E Younkin
Attorney at Law
PO Box 1288
Bozeman MT 59771-1288

Elena J Zlatnik
Attorney at Law
PO Box 7909
Missoula MT 59807-7909